

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

VANESSA A.,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL  
CENTER,

Service Agency.

OAH Case No. 2011010654

**DECISION DENYING THE APPEAL**

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 9, 2011, in Pomona. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Vanessa A. (Claimant), who was present, was represented by her mother.<sup>1</sup>

The San Gabriel/Pomona Regional Center (Service Agency) was represented by Daniela Martinez, Fair Hearing Manager.

**ISSUE**

Does Claimant have a developmental disability (mental retardation or the fifth category) making her eligible for regional center services under the Lanterman Developmental Disabilities Services Act?

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<sup>1</sup> Initials and family titles are used to protect the privacy of Claimant and her family.

## FACTUAL FINDINGS

### *Parties and Jurisdiction*

1. Claimant is a 30-year-old female on whose behalf regional center services were requested from the Service Agency in September of 2010.

2. By a Notice of Proposed Action dated December 16, 2010, Claimant's mother was advised that Service Agency staff had concluded Claimant did not have any of the five qualifying developmental disabilities and therefore was not eligible for services.

3. On January 3, 2011, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, by which the denial of eligibility was appealed.

### *Claimant's Background*

4. Claimant lives at home with her mother. The family has lost contact with Claimant's father. She is not presently employed. Claimant has never lived alone.

5. Per Claimant's mother, Claimant was delayed in most of her significant developmental milestones, but the information is vague. Claimant had a history of seizure activity when she was a child between the ages of one and six. She has not had a seizure since then and has not been diagnosed with a seizure disorder or epilepsy.

6. Claimant's older brother was shot and killed when she was a teenager. That was profoundly traumatic to Claimant, who readily admits "I haven't been the same since." At or about that time, a gradual onset began of psychiatric symptoms and problems. Claimant has longstanding diagnoses of depression, anxiety and panic attacks. She is currently under psychiatric care at Arcadia Mental Health, where she receives monthly therapy and is prescribed psychotropic medications.

7. Claimant received special education services for a learning disorder starting in the second grade. She was placed in a resource classroom for most of her school years. School records are sketchy, indicating mainly that Claimant needed help grasping new concepts and in remembering what she was taught. In 1991, a physician with Los Angeles County/U.S.C. Hospital, Dr. A. Yusin, had seen Claimant and ruled out Attention Deficit Hyperactivity Disorder (ADHD) for her. But Dr. Yusin indicated that Claimant might be dyslexic, and recommended that Claimant be placed in a special learning disability class where she could be taught to read using phonetic and kinesthetic approaches. School authorities considered Claimant for such a placement, but ultimately decided that her needs were insufficient to warrant that type of placement.

8. Claimant's grades fluctuated throughout her middle and high school years; some semesters she received Bs, Cs and Ds, with an occasional A or two; other semesters she received mostly Ds and Fs, with an occasional C or two. Claimant did not graduate from

high school. She dropped out in the 10th grade for reasons her mother could not remember. Thereafter, she was home-schooled for an unspecified period; attended continuation schools for a few years; and then tried junior college classes. Claimant has failed in her attempts to obtain a G.E.D.

9. Claimant had a job for a few months in telemarketing, but was “laid off” because she was not able to follow instructions. She also had a job at MacDonald’s for a few months, but was also “laid off” because she had panic attacks when there were “too many people around.”

#### *The Service Agency’s Assessment of Claimant*

10. In September of 2010, Claimant was referred to the Service Agency by Arcadia Mental Health. On October 14, 2010, Service Agency Intake Vendor Flor Favela-Garcia met with Claimant and her mother to conduct a social assessment. In terms of Claimant’s current functioning, Ms. Favela-Garcia noted: Claimant is able to complete self-help and independent living tasks with some reminders and supervision; she is able to take care of her personal needs and household chores, with reminders to initiate and/or complete some chores; she responds appropriately to interaction in familiar and comfortable settings; she constantly daydreams and gets anxious when placed in difficult situations; she knows most personal information and understands complex directions; when motivated, she can remain focused on a single activity for over one hour; and, she can communicate using complex sentences.

11. Service Agency staff psychologist Deborah Langenbacher reviewed Claimant’s records. During that review, Dr. Langenbacher discerned from Claimant’s school records that in 1989 the school district had rated Claimant’s cognitive skills to be “low normal based on the ordinal scales,” but that no IQ testing was apparent. Dr. Langenbacher recommended that Claimant be referred for a psychological evaluation.

12. The Service Agency referred Claimant to Edward G. Frey, Ph.D., for a psychological evaluation, which was conducted on November 18, 2010. Dr. Frey interviewed Claimant and her mother, reviewed records, and administered a number of tests focused on Claimant’s intellectual and adaptive skills. In his report from that evaluation, Dr. Frey stated Claimant achieved cognitive test scores within the mild range of mental retardation, with marked deficits in non-verbal reasoning. Claimant achieved academic test results suggestive of a “mild delay.” Claimant’s social/adaptive functioning test results indicated significant deficits in all three areas. But Dr. Frey believed Claimant’s psychiatric symptoms and general slowness, including her “spacing out” during the testing, resulted in Claimant’s decreased attention and concentration. Dr. Frey believed that Claimant evidenced so many significant psychiatric features during the testing that he had serious concern regarding the validity and reliability of the test scores.

13. Based on his evaluation, Dr. Frey diagnosed Claimant with Depressive Disorder Not Otherwise Specified. Dr. Frey deferred a diagnosis of mental retardation, because he did not believe he had sufficient information available to make such a diagnosis, such as psychological testing indicative of mental retardation before she turned 18.

14. By December 16, 2010, the Service Agency's Interdisciplinary Eligibility Team reviewed and discussed the above information. The team concluded that Claimant was not eligible for regional center services, because she did not meet the criteria for a diagnosis of mental retardation, or any of the four other qualifying conditions, and because the records they reviewed did not indicate the onset of a developmental disability prior to Claimant turning 18 years old.

15. The Service Agency has recommended that Claimant continue to receive mental health services, apply for Social Security and Medi-Cal benefits, as well as apply for vocational services from the California Department of Rehabilitation.

#### *Claimant's Evidence*

16. Claimant's mother testified and established the following. Her daughter always had a hard time in school. Claimant has not been able to pass the test to obtain a G.E.D. She cannot live alone and she cannot keep a job. Claimant cannot do what her siblings can do. She believes her daughter needs help. Claimant's mother does not remember anybody diagnosing Claimant with mental retardation before she turned 18 or thereafter, with the possible exception of one health care provider who saw Claimant when she was 19 or 20. However, there are no records or evidence of any such diagnosis, so this part of Claimant's mother's testimony is discounted.

17. At the request of Claimant's clinicians at Arcadia Mental Health, Claimant has requested Social Security benefits. According to Claimant's mother, Claimant has been deemed eligible for such benefits based on disabilities caused by her psychiatric problems.

18. As part of the process of becoming eligible for Social Security benefits, Claimant was evaluated by Clinical Psychologist Ahmed R. Riahinejad on April 20, 2011. Dr. Riahinejad did the same type of work-up that Dr. Frey did, including interviews, review of limited records, and testing. Dr. Riahinejad found Claimant's intellectual functioning to be deficient, and her general fund of knowledge low. Cognitive tests administered to Claimant yielded an overall I.Q. of 61, which Dr. Riahinejad deemed to be in the mildly mentally retarded range, although he added that the scores were a slight underestimate of her ability.

19. Dr. Riahinejad diagnosed Claimant with Depressive Disorder, with anxiety. Dr. Riahinejad also gave Claimant a provisional diagnosis of borderline intellectual functioning pending further review of her records prior to the age of 18, and recommended that a diagnosis of Mental Retardation be ruled out. By indicating that a diagnosis of Mental Retardation should be ruled out, Dr. Riahinejad indicated that he could not diagnose

Claimant with Mental Retardation at this time. It is not clear whether that conclusion was due to the effects that Claimant's depressive disorder may have had her test performance, the lack of information of Claimant's intellectual functioning before she turned 18, or both.

20. Claimant also testified. She was perfectly conversant. She directly answered questions without hesitation and generally was able to make herself understood. She behaved appropriately and seemed to appreciate the seriousness of the proceedings. She testified that she cannot do many of the things her siblings do. School was never easy for her. It is hard for her to follow even simple instructions. She now spends her time watching television, or babysitting and doing errands for her siblings. She has never lived alone. She does not have friends. She wants help in addition to what she is receiving from Arcadia Mental Health.

## LEGAL CONCLUSIONS

### *Jurisdiction and Burden of Proof*

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.<sup>2</sup>) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-3.)

2A. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on her. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

2B. With regard to the issue of eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the claimant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that claimant was not eligible. (*Id.* at p. 1137.)

2C. Based on the above, Claimant in this case has the burden of proving by a preponderance of the evidence that her evidence regarding eligibility is more persuasive than the Service Agency's.

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<sup>2</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

3. An applicant is eligible for services under the Lanterman Act if she can establish that she is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is referred to as the fifth category. (§ 4512, subd. (a).) A qualifying condition must also onset before one's 18th birthday and continue indefinitely thereafter. (§ 4512.)

*Is Claimant Mentally Retarded or Does She Have a Condition in the Fifth Category?*

4A. It was not established that Claimant is mentally retarded. Neither Dr. Frey nor Dr. Riahinejad were able to make that diagnosis despite intellectual functioning test scores in the mildly retarded range. Dr. Frey's explanation is that the testing appeared to be impacted by the features of Claimant's psychiatric disorder, which is a well known depressant of test scores. It is unclear why Dr. Riahinejad is unable to make that diagnosis at this time. No other expert has apparently diagnosed Claimant with mental retardation.

4B. In addition, it was not established that Claimant was diagnosed with mental retardation before she turned 18. A qualifying developmental disability must onset before one turns 18 to qualify for services under the Lanterman Act. (Factual Findings 4-20.)

5A. The "fifth category" is described as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals." (§ 4512, subd. (a).) A more specific definition of a "fifth category" condition is not provided in the statutes or regulations. Whereas the first four categories of eligibility are specific (e.g., epilepsy or cerebral palsy), the disabling conditions under this residual fifth category are intentionally broad so as to encompass unspecified conditions and disorders. But the Legislature requires that the condition be "closely related" (§ 4512) or "similar" (Cal. Code Regs., tit. 17, § 54000) to mental retardation. "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Mason v. Office of Administrative Hearings*, *supra*, 89 Cal.App.4th at p. 1129.)

5B. In this case, Claimant failed to meet her burden of establishing by a preponderance of the evidence that she has a qualifying fifth category condition. It is true that her current test scores indicate she is functioning like one who is mentally retarded. Dr. Frey attributes that to testing problems associated with her psychiatric disorder. Dr. Riahinejad describes her intellectual functioning as "borderline," which can be a shorthand expression for someone who is functioning like one with mental retardation. However, it is unclear why Dr. Riahinejad is guarded in making only a provisional diagnosis of borderline intellectual functioning. Claimant and her mother provided anecdotal evidence that some aspects of her current functioning is significantly impaired. But during the intake process with the Service Agency, Claimant and her mother admitted that Claimant can perform some more complex activities. Moreover, some deficits relate to Claimant "spacing out" or "daydreaming," indicative that her longstanding depression is a cause of some problems.

5C. The biggest obstacle in Claimant's case is the lack of evidence of an onset of a fifth category type condition before she turned 18. School records give a glimpse of cognitive problems, but those problems are characterized as a learning disorder. The school records, though admittedly scant, do not depict Claimant as a person similar to one who is mentally retarded or who needed similar treatment. Claimant's acknowledgement that some of her problems began at or about the time she began experiencing her depressive disorder in her teens further clouds the picture. The scant evidence sketches a snap-shot of Claimant as a person who was functioning at the lowest depths of the average range in her teens, until she experienced an emotional trauma, which led to a depressive disorder that further decreased her ability and functioning. In light of her documented learning and psychiatric disorders, and the scant evidence of her situation before she was 18, it simply cannot be concluded that it is more probable than not that Claimant had a fifth category type condition before she turned 18. (Factual Findings 4-20.)

*Is Claimant Eligible for Services?*

6A. Excluded from eligibility are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or disorders solely physical in nature. (Cal. Code Regs., tit. 17, § 54000). If one's condition is *solely* caused by one of these three "handicapping conditions," he/she is not eligible. "Psychiatric disorders" are defined as impaired intellectual or social functioning which originated as a result of a psychiatric disorder, or treatment given for such a disorder. "Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have been seriously impaired as an integral manifestation of the disorder." (Cal. Code Regs., tit. 17, § 54000, subd. (c) (1).) "Learning disorders" are defined as a significant discrepancy between estimated cognitive potential and actual level of educational performance which is not "the result of generalized mental retardation, educational or psycho-social deprivation, [or] psychiatric disorder...." (Cal. Code Regs., tit. 17, § 54000, subd. (c) (2).)

6B. In this case, some of Claimant's documented problems are associated with her learning and psychiatric disorders, all of which are excluded from consideration of her eligibility. Claimant's remaining symptoms and problems not associated with her learning disorder or psychiatric disorders are insufficient to warrant a diagnosis of mental retardation or the fifth category condition for Claimant as discussed above. However, the issue of whether she has a fifth category condition at this time, or had one before she turned 18, is a close one. To a large extent, the lack of evidence and information about Claimant's condition before she turned 18 has been acknowledged as a problem by the two psychologists who have recently evaluated her. Claimant and her mother are encouraged to seek and obtain any such new information and submit it to the Service Agency for further evaluation. The same is true if a qualified health care professional diagnoses Claimant with Mental Retardation.

7. Since Claimant failed to establish by a preponderance of the evidence that she has any of the five qualifying developmental disabilities, she failed to establish a basis of eligibility for regional center services under the Lanterman Act. (Factual Findings 1-20.)

### ORDER

Claimant Vanessa A.'s appeal of the San Gabriel/Pomona Regional Center's determination that she is not eligible for regional center services is denied.

DATED: August 30, 2011

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ERIC SAWYER,  
Administrative Law Judge  
Office of Administrative Hearings

### NOTICE

**This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.**